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No. 93-439

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER JOSEPH SALZMANN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did defendant raise a federal double jeopardy claim in state trial court?

2. Does the double jeopardy clause require States to provide defendants with an interlocutory appeal as a matter of right?

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BRIEF IN OPPOSITION

The State accepts defendant's statement of jurisdiction, the opinions below, and the constitutional provisions involved.

STATEMENT OF THE CASE

Defendant's federal claim arises in an unusual procedural posture. Although defendant argues that the federal double jeopardy clause creates the right to an interlocutory appeal, he never preserved the underlying federal right he seeks to vindicate on appeal. Nor does he have a non-frivolous federal claim in light of the procedural posture in which this issue arises. Because this issue is procedurally more complex than defendant's petition suggests, this brief will first describe the issues defendant raised in state trial court and the trial court's resolution of them. It then will discuss the state procedures for seeking interlocutory review. Finally, it will discuss the state courts' resolution of defendant's requests for appellate review.

A. Defendant's Trial.

Defendant was charged with six counts of rape, kidnapping, and robbery. He raised a double jeopardy claim twice during his

trial. The first claim was raised midway through the State's case in chief. Defendant filed five alternative motions, all of which arose out of the same discovery dispute. Only the third motion is relevant here.[1] Defendant's third motion asked the trial court to declare a mistrial and dismiss the case under the double jeopardy clause. Defendant, however, based his third motion solely on state constitutional grounds. The memorandum he filed in support of this motion only cited cases decided under the state constitution.[2] Similarly, when defendant argued his motion orally before the state trial court, he limited his double jeopardy claim to state constitutional grounds.[3]

After considering defendant's evidence, the state trial court denied his third motion without explanation.[4] (Tr. 646). The State accordingly proceeded to put on the rest of its case, as did defendant. When the case was submitted to the jury, the jury was unable to reach a verdict. (Tr. 1038–39). On defendant's motion, the trial court declared a mistrial because of the hung jury and set a date for the new trial. (Tr. 1040).

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[1] The first motion asked the trial court to dismiss the case as an exercise of its discretion. (Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss/Suppress/Mistrial, Etc. at 21–22). The second motion asked the court to exclude evidence. (*Id.*, at 23). Defendant withdrew the fourth motion. (Tr. 574). The trial court reserved ruling on the fifth motion for contempt at defense counsel's request. (Tr. 647).

[2] Defendant's memorandum in support of his motion states: "[T]he court should declare a mistrial and dismiss the indictment under the principles of *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983)." (Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss/Suppress/ Mistrial, Etc. at 23). *State v. Kennedy* based its decision solely on the state constitution. *See* 295 Or., at 266–67.

[3] At oral argument, defendant cited three cases in support of his double jeopardy claim: *State v. Kennedy*, *supra*; *State v. Rathbun*, 287 Or. 421, 600 P.2d 392 (1979); and *State v. Halford*, 101 Or. App. 660, 792 P.2d 467 (1990). (Tr. 599–600). All three are based solely on the state constitution.

[4] The trial court also denied the other alternative motions that were not withdrawn or reserved. (Tr. 645–47).

Defendant raised his second double jeopardy claim after the jury failed to reach a verdict but before the new trial began. He filed a document captioned "Posttrial Motion to Dismiss." (*See* Pet. for Cert. at A-11). His post-trial motion arose out of the same discovery disputes that formed the basis for the five alternative motions he had filed mid-trial. Defendant again claimed that the prosecutor's failure to provide him with discovery barred the State from retrying him. As part of the "Points and Authorities" in support of his motion, defendant cited without any discussion Article I, section 12 of the Oregon Constitution and the Fifth and Fourteenth Amendments.[5] (*See* Pet. for Cert. at A-11).

Although defendant's post-trial motion referred to the Fifth Amendment, defendant later explained that he based his motion on state constitutional grounds. At the hearing on his motion, defendant's counsel told the trial court: "The fact is that there has been a mistrial [because of the hung jury], the fact is from our standpoint that [the] prosecution should be barred by the double jeopardy principles of the Oregon Constitution."[6] (*Ibid.*). Defense counsel never referred to the federal constitution, and the trial court sought to clarify the basis for defendant's argument. (Tr. 1137). It asked, "[D]o you have the cases that you're relying on?" (*Ibid.*). The court explained that it understood defendant to be relying on two state cases, *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983), and *State v. Fortune*, 112 Or. App. 247, 828 P.2d 483 (1992). (*Ibid.*). Both cases are based

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[5] The motion states that "[d]efendant will submit a detailed memorandum as soon as possible." (Pet. for Cert. at A-11). The trial court record shows, however, that no memorandum was submitted.

[6] Defendant did not rely on the mistrial resulting from the hung jury as the basis for his double jeopardy claim. Rather, he reasoned that because the hung jury could lead to a second trial, the trial court should consider his claim that the state constitution barred the prosecutor from retrying him because of his failure, in defendant's view, to provide him with complete discovery.

solely on the state double jeopardy clause. Defendant agreed that these were the cases on which he was relying. (*Ibid.*).

Not only did defendant base his post-trial motion solely on the state constitution, but he also agreed with the trial court that his motion was limited in an additional respect. Defense counsel noted that one of the mid-trial motions he filed earlier asked that the prosecutor be held in contempt for failing to provide him with discovery. (Tr. 1135; *see* note 1 *supra*). He also noted that the trial court had reserved ruling on this motion. (*Ibid.*). Because defense counsel appeared to view his post-trial motion as a continuation of the earlier motion for contempt, the trial court asked whether the post-trial request for dismissal based on double jeopardy principles was separate from or part of the contempt motion. (Tr. 1138). Defense counsel responded that he viewed the request for dismissal as an alternative sanction for contempt. (*Ibid.*). He noted that the motion for contempt had been made during trial, "that the motion is still before the court, and that it is appropriate to proceed on that." (*Ibid.*). Although defendant's point is not completely clear, he appears to have argued that double jeopardy principles were relevant to the extent they informed the trial court's determination of the appropriate sanction for a finding of contempt.

The state trial court accordingly considered defendants' double jeopardy claim as part of his contempt motion. After hearing additional evidence offered in support of defendant's post-trial motion, the state trial court ruled that some of the information that defendant felt should have been disclosed was not discoverable. (Tr. 1148–49). Although some of the evidence presented a closer question in terms of discovery, the court found it unnecessary to decide that issue to resolve defendant's motion. (Tr. 1149). The court ruled that even if the evidence were discoverable, the prosecutor lacked the mental state that would require that the case be dismissed under the state double jeopardy clause. (*Ibid.*). The court explained that it was "not willing to make a finding of, as required by the case[s], that [the prosecutor] knew that his conduct was improper and would prejudice [defendant]." (*Ibid.*).

The state trial court accordingly denied defendant's post-trial motion to dismiss, and defendant sought interlocutory review of the trial court's ruling. Before discussing the state appellate courts' resolution of this case, this brief will first discuss the state procedures that are generally available for obtaining interlocutory review.

B. State Appellate Procedure.

In Oregon, the right to appeal is governed by statute. *See* Or. Rev. Stat. § 138.005 *et seq.* The Oregon statutes do not provide for interlocutory appeals as a matter of right. They do, however, provide that a party who is dissatisfied with an interlocutory ruling may petition for a writ of mandamus. Or. Rev. Stat. § 34.105 *et seq.* Mandamus is a discretionary remedy. Or. Rev. Stat. § 34.110. Additionally, mandamus is only available in a certain class of cases.[7] The Oregon Court of Appeals has recognized, however, that a pretrial ruling denying a double jeopardy motion is the kind of ruling that may be considered on mandamus. *State ex rel. Wark v. Freerksen*, 84 Or. App. 90, 94, 733 P.2d 100 (1987). Because the remedy is discretionary, however, a petitioner challenging a double jeopardy ruling must still demonstrate that his or her claim presents a sufficiently significant question to warrant mandamus. A claim that seeks to relitigate the trial court's factual findings is not sufficient. *State ex rel. Ware v. Hieber*, 267 Or. 124, 128-29, 515 P.2d 721 (1974).

C. Defendant's Appellate Review.

After the state trial court denied defendant's post-trial motion to dismiss, defendant pursued two alternative courses. First, he

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[7] Generally, three classes of cases may not be reviewed on mandamus. Mandamus is not available: (1) to question a trial court's exercise of discretion, Or. Rev. Stat. § 34.110; *State ex rel. Venn v. Reid*, 207 Or. 617, 624-25, 298 P.2d 990 (1956); (2) where an appeal from final judgment will provide an adequate remedy, *State ex rel. LeVasseur v. Merten*, 297 Or. 577, 686 P.2d 366 (1984); or (3) to relitigate the trial court's factual findings, *State ex rel. Ware v. Hieber*, 267 Or. 124, 128-29, 515 P.2d 721 (1974).

petitioned for a writ of mandamus to the Oregon Supreme Court. The Oregon Supreme Court denied the petition.[8]

Second, defendant filed a notice of appeal in the Oregon Court of Appeals. He also asked the Court of Appeals to determine whether it had jurisdiction to hear his interlocutory appeal. Defendant acknowledged that he had no statutory right to an interlocutory appeal. He argued, however, that various state and federal constitutional provisions, including the federal double jeopardy clause, required that he be given an interlocutory appeal.

The Court of Appeals initially issued a brief order dismissing defendant's appeal for want of jurisdiction. When defendant petitioned for reconsideration, the Court of Appeals issued an opinion adhering to its original ruling. The opinion addresses defendant's claims that the state and federal constitutions require that he be given an interlocutory appeal. The Oregon Supreme Court denied defendant's petition for review. Defendant now petitions for a writ of certiorari to the Oregon Court of Appeals to review its order dismissing his interlocutory appeal for want of jurisdiction.

REASONS TO DENY CERTIORARI

Defendant's petition for certiorari should be denied for three reasons. First, the question defendant raises is purely hypothetical. Even if the Court were to hold that defendant is entitled to an interlocutory appeal, defendant failed to preserve the underlying federal claim he seeks to vindicate on appeal. The holding defendant seeks will have no effect on his federal rights. Second, defendant has no colorable federal double jeopardy claim. The trial court's factual finding that the prosecutor lacked the requisite intent disposes of it. This case accordingly does not provide an appropriate vehicle for considering the issue defendant raises. Third, the issue defendant raises does not warrant

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[8] A state order denying a petition for mandamus is similar to a federal order denying a petition for certiorari. Neither explains the basis for the ruling.

certiorari. This Court's decisions are clear, and there is no uncertainty among the States that requires resolution.

A. The Issue Defendant Raises Is Hypothetical.

The question presented is narrow. Defendant argues that the federal double jeopardy clause requires States to provide interlocutory appeals as a matter of right. Defendant raised this federal issue at the first possible opportunity, when he asked the Oregon Court of Appeals to determine whether it had jurisdiction over his appeal. Defendant, however, never raised the underlying federal claim in state trial court. He never argued in state trial court that the federal double jeopardy clause barred the State from retrying him. Rather, he based his underlying double jeopardy claim solely on state constitutional grounds.

In this procedural posture, the question defendant's petition presents is purely hypothetical. Even if the Court were to hold that the federal double jeopardy clause creates the right to an interlocutory appeal, defendant never preserved the underlying federal claim he seeks to vindicate on appeal. Defendant's failure to preserve his underlying federal claim bars him from raising that claim in the state appellate courts. *See State v. Castrejon*, 317 Or. 202, 207, 856 P.2d 161 (1993) (failure to preserve federal constitutional claim below bars a party from raising it on appeal); *State v. Walton*, 311 Or. 223, 240–41, 809 P.2d 81 (1991) (same). Defendant has no underlying federal claim left to vindicate in the state appellate courts even if the double jeopardy clause required Oregon to provide him with an interlocutory appeal.[9]

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[9] The point is not that this Court lacks jurisdiction to consider any of petitioner's federal claims. *See* 28 U.S.C. § 1257(a). The Court has jurisdiction to consider the federal issue defendant raised and the Oregon Court of Appeals reached — whether the federal double jeopardy requires States to provide interlocutory appeals. *See Whitney v. California*, 274 U.S. 357, 360–63 (1927). The point is that defendant's failure to raise the underlying federal claim at trial would bar him, as a matter of state law, from raising it in the state appellate courts even if this Court were to hold that the double jeopardy clause requires that he be given an interlocutory

(continued...)

It follows that the issue defendant asks the Court to decide is purely advisory. It will have no effect on his federal rights. Put another way, defendant lacks standing to raise this issue. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). The judicial relief defendant requests — a declaration that he has a right to an interlocutory appeal — will not redress his underlying federal claim. Whether described as a lack of standing or a request for an advisory opinion, the procedural posture in which this case arises makes it a poor vehicle for deciding whether the double jeopardy cause requires States to provide interlocutory appeals.

Defendant's discussion of this issue is limited to two sentences. His petition states in text that defendant "moved to dismiss based on double jeopardy, due to the prosecutor's misconduct." (Pet. for Cert. at 2). It states in a footnote that "[t]he argument on misconduct was on both state and federal grounds." (Pet. for Cert. 2 n. 1). A review of the record demonstrates otherwise.

As noted in the statement of the case, defendant raised a double jeopardy claim twice in the trial court. The first time was midway through the State's case-in-chief when defendant filed his motion for a mistrial and dismissal under the double jeopardy clause. He based his double jeopardy claim, however, entirely on the state constitution. He never referred to the federal constitution and the cases he cited in his supporting memorandum and at oral argument were based solely on state constitutional grounds.

The second time defendant raised a double jeopardy issue was after the state trial court declared a mistrial because of the hung jury. Although defendant's post-trial motion to dismiss cited the Fifth Amendment as a basis for the motion, defendant subsequently explained at the hearing on his motion that he was basing his claim on the state constitution. When the state trial court questioned him about the authority on which he relied, defendant

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[9](...continued)
appeal. *See State v. Walton*, 311 Or., at 240–41. It might also be noted that defendant's failure to preserve the underlying federal claim in state court would preclude this Court from reaching that claim, as opposed to his claimed federal right to an interlocutory appeal. *See* 28 U.S.C. § 1257(a).

agreed that he was relying on state cases that were decided solely under the state constitution. Beyond that, defendant also agreed that the double jeopardy principles he urged were relevant only to determining the appropriate sanction for a state contempt violation.

Because state procedural rules bar defendant from raising the underlying federal claim in the state appellate courts, this case provides no occasion to decide whether the double jeopardy clause requires States to provide defendants with interlocutory appeals.

B. Defendant Has No Colorable Federal Claim.

Certiorari should be denied for a second reason. Even if the underlying federal claim were preserved, defendant faces another, equally difficult hurdle. The state trial court's factual findings demonstrate that defendant's underlying federal claim is frivolous. The federal double jeopardy clause bars a retrial only when the governmental "conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). The prosecutor's intent is a question of fact, and the state trial court's factual finding will ordinarily be dispositive. *Ibid.* As the Court explained in *Oregon v. Kennedy*, the state trial court's finding that the prosecutor did not act intentionally "is the end of the matter for the purposes of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution." *Ibid.*

In this case, the state trial court tested the prosecutor's conduct against the more stringent state constitutional standard and found that the prosecutor did not act knowingly.[10] If, as the state trial court found, the prosecutor did not act knowingly, then

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[10] The state double jeopardy clause bars a retrial if the prosecutory knew that the conduct that prompted the mistrial was improper and either intended or was indifferent to the resulting mistrial. *State v. Kennedy*, 295 Or., at 276. As noted above, the state trial court explained that it was "not willing to make a finding of, as required by the case[s], that [the prosecutor] knew that his conduct was improper and would prejudice [defendant]." (Tr. 1149).

he clearly did not act intentionally. After the state trial court's factual finding, defendant has no colorable federal double jeopardy claim. *Oregon v. Kennedy*, 456 U.S., at 679. Even if defendant could still pursue a federal double jeopardy claim in state appellate court, there is little reason to decide whether defendant has a federal constitutional right to an interlocutory appeal when the state trial court's adverse factual findings are, as the Court put it in *Oregon v. Kennedy*, "the end of the matter for the purposes of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments." *Ibid.*; *cf. Richardson v. United States*, 468 U.S. 317, 322 (1984) (only colorable double jeopardy claims may be appealed under the collateral order doctrine).

C. Defendant's Constitutional Claim Does Not Warrant Certiorari.

Not only does this case provide a poor vehicle for considering the question defendant's petition presents, but the question itself does not warrant granting certiorari. Defendant's petition raises three reasons why either the Oregon Court of Appeals erred or why the Court should grant certiorari. First, defendant argues that the protections guaranteed by the double jeopardy clause would be meaningless if there were no interlocutory appeal. Second, he claims that *Abney v. United States*, 431 U.S. 651 (1977), establishes that an interlocutory appeal is constitutionally required. Finally, he argues that other States have allowed interlocutory appeals. None of these arguments provide any reason to grant certiorari.

Defendant argues initially that the right not to be tried twice would be "meaningless if there is no mechanism, such as an appeal, to review the double jeopardy claim before the second trial." (Pet. for Cert. at 5). Defendant overstates his case in at least two respects. First, he gives too little weight to the trial court's resolution of his federal claims. A trial court's ability to rule on a double jeopardy claim gives the federal right some

meaning.[11] Indeed, because the federal constitution does not require States to create appellate courts, *see McKane v. Durston*, 153 U.S. 684, 687 (1894), there is no reason to think that the constitution contemplates that the right requires any greater protection. Defendant, for his part, never explains why appellate review, as opposed to review by the trial court, is necessary to give the constitutional right meaning.[12]

At least in Oregon, defendant's argument fails in a second respect. In Oregon, a defendant may always petition an appellate court for a writ of mandamus to prevent the trial from going forward. To be sure, the remedy is discretionary. State appellate courts will not grant mandamus to hear frivolous claims or to second-guess the trial court's resolution of factual issues. But the possibility that mandamus will be granted when the trial court's denial of a double jeopardy claim merits review refutes defendant's argument that the federal right is "meaningless" in Oregon absent an appeal as matter of right. Other States have reached the same conclusion. *See People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 387 N.E.2d 325, 330–31, *cert. denied* 444 U.S. 940 (1979); *State v. Robideaux*, 475 N.W.2d 915, 916 (N.D. 1991); *State v. Jenich*, 94 Wisc. 2d 74, 292 N.W.2d 348 (1980). In the State's view, the premise of defendant's argument has little logic to recommend it.

Defendant's second point is based on *Abney v. United States*, *supra*. He says that a "fair reading of *Abney* establishes that it is constitutionally based." (Pet. for. Cert. at 10). Both *Abney* and later decisions make clear that it is not. The Court framed the issue in *Abney* as "whether a pretrial order denying a motion to

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[11] Where, as here, the federal right turns on the trial court's factual findings, the trial court's determination will usually be dispositive. It is the appeal that will be meaningless, not the right.

[12] Defendant's point might have more force if it were based on equal protection, but defendant's petition rests solely on the double jeopardy clause. The question presented refers only to the double jeopardy clause, (Pet. for Cert. at i), and the only constitutional provision petitioner identifies as relevant is the Fifth Amendment, (*See id.*, at 2).

dismiss on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable." 431 U.S., at 653. The Court was careful to make clear that the "right of appeal . . . is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute — in this case, 28 U.S.C. § 1291." 431 U.S. at 656.

The remainder of the Court's inquiry focuses on whether a double jeopardy claim is a collateral order and thus a "final decision" within the meaning of section 1291. One of the tests for a collateral order is that it must involve a right that would be "'lost, probably irreparably,' if review had to wait until final judgment." 431 U.S. at 658. The Court explained that double jeopardy claims meet this test because the right, by its terms, is a right not be tried. 431 U.S. 661-62. The Court did not hold that appellate review was constitutionally required to vindicate a double jeopardy claim. Nor did it hold that consideration by the trial court was insufficient to protect a defendant's constitutional right not to be tried twice. Rather, it held that an order denying a double jeopardy claim comes within a limited class of orders for which Congress has authorized immediate review.

Not only is *Abney* not controlling, but its reasoning provides little guidance for the issue defendant raises here. Because *Abney* started from the proposition that section 1291 authorizes immediate review for a limited class of pretrial orders, *see Cohen v. Beneficial Industrial Finance Corp.*, 337 U.S. 541 (1949), the only question the Court addressed was whether an order denying a double jeopardy claim is the kind of order Congress intended to be reviewed now rather than later. It neither asked nor answered the question whether immediate review is constitutionally necessary to vindicate a defendant's double jeopardy rights. Defendant errs in reading it as if it did. Had *Abney* held that the collateral order doctrine is constitutionally required to protect double jeopardy rights, then defendant's interpretation of *Abney* might be justified. The collateral order doctrine, however, originated almost 30 years earlier when the Court held that a plaintiff could bring an immediate appeal from a pretrial order

requiring that he to post a bond. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S., at 544–45. All that *Abney* sought to do was determine whether a double jeopardy claim was sufficiently analogous to the bond requirement in *Cohen* to justify an immediate appeal. Its reasoning provides no support for defendant's claim.

Were there any doubt that *Abney* is statutorily based, the Court's subsequent cases remove it. In *Richardson v. United States*, 468 U.S. 317 (1984), the Court stated that "we held [in *Abney*] that the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds was appealable as a 'collateral order' under 28 U.S.C. § 1291." 468 U.S., at 320. It explained that "we held that the claim in *Abney* met the three-part test established in *Cohen v. Beneficial Industrial Loan Corp.*, [337 U.S. 541 (1949)]." *Ibid.* Similarly, in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), the Court described *Abney* as one of several decisions defining what constitutes a collateral order for the purposes of section 1291. 489 U.S., at 799. The Court explained that the nature of the right (whether constitutional or statutory) is relevant to determining whether it is a right not to be tried or a right whose remedy requires the dismissal of the charges. *Id.*, at 801. Only the former is sufficient to constitute a collateral order for the purposes of section 1291. *Ibid.* These opinions describe *Abney* for what it is, a statutorily based decision.

Although both *Abney* and the Court's subsequent decisions make clear that the issue in *Abney* was statutory, defendant raises two arguments to support his contrary interpretation of the decision. He argues initially that the Court has reserved the question whether *Abney* states a statutory or a constitutional rule. (Pet. for Cert. at 9). Defendant bases this argument on two dissents from the denial of certiorari. (*See ibid.*). One case is simply inapposite. *See Green v. Ohio*, 455 U.S. 976 (1982) (White, J., dissenting from the denial of certiorari). In *Green*, the state procedure allowed the defendant to take an interlocutory appeal. *Id.*, at 977. The case accordingly did not present the

issue defendant raises here. The dissent's point, on which defendant relies, went to a separate issue. *Id.*, at 978–79. The dissent noted that the Court had jurisdiction because the state court ruling was final for the purposes of section 1257(a). *Ibid.*; *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975). Far from reserving the question whether the holding in *Abney* was constitutionally based, the dissent in *Green* addressed a different issue.

The other case defendant cites, *Spradling v. Texas*, 455 U.S. 971 (1982) (Brennan, J., dissenting from the denial of certiorari), is more to the point. The fact, however, that the dissent would have granted certiorari does not mean that the Court considered the issue an open one. Moreover, even the dissent did not say that the double jeopardy clause requires an interlocutory appeal, as defendant argues. *See* 455 U.S., at 973. The dissent would have relied on the equal protection clause, an issue defendant does not raise here. *Ibid.*; *see* note 12 *supra*. In any event, to the extent it was unclear whether *Abney* was based on constitutional or statutory grounds, the Court's subsequent decision in *Richardson v. United States*, *supra*, removed any doubt. In *Richardson*, the Court described *Abney*'s holding as statutory. 468 U.S., at 320.

The point of defendant's second argument is not completely clear. Defendant discusses several cases holding that federal statutes authorize federal appellate courts to review interlocutory orders. (Pet. for Cert. at 9–11). One case addresses when state rulings are considered final for the purposes of section 1257(a). *Mitchell v. Forsythe*, 472 U.S. 511, 525 n. 8 (1985). The others address when a federal decision is considered a final decision for the purposes of section 1291. *See Mitchell v. Forsythe*, 472 U.S., at 527–30; *Richardson v. United States*, *supra*; *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Stack v. Boyle*, 342 U.S. 1 (1951). None of these statutory cases is relevant to the constitutional issue defendant raises unless one assumes that the constitu-

tion requires States to provide interlocutory review whenever Congress authorizes federal courts to do so.[13]

Finally, defendant argues that the state courts have varied in their reading of *Abney*. As he puts it, "Some say it describes a constitutional right. Some say it does not. . ." (Pet. for Cert. at 6). It might be more accurate to say that two States have read *Abney* as being constitutionally based.[14] The other States that have reached this issue have concluded that *Abney* is statutorily based.[15] Beyond that, a number of States have allowed interlocutory appeals as a matter of state procedure for the same reasons that persuaded this Court in *Cohen v. Beneficial Finance Corp.* and *Abney*.[16] A number of States have declined to allow inter-

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[13] In the course of his argument, defendant restates what appears to be the premise of his petition: "When a constitutional guarantee protects a defendant from going to trial at all, there must be a tool to effectuate that right." (Pet. for Cert. at 10). Defendant never explains, however, why the trial court's consideration (especially when coupled with the right to seek mandamus) is not constitutionally sufficient even though Congress may choose to provide interlocutory review for comparable federal district court decisions.

[14] *See Nalbandian v. Superior Court*, 163 Ariz. 126, 786 P.2d 977 (Ariz. App. 1989), *cert. denied* 111 S. Ct. 554 (1990); *Ex parte Robinson*, 641 S.W.2d 552, 554-55 (Tex. Cr. App. 1982).

[15] *See Burleson v. State*, 552 So.2d 186 (Ala. Cr. App. 1989); *People ex rel. Mosley v. Carey*, *supra*; *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988); *State v. Robideaux*, *supra*; *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986).

[16] *See, e.g., State v. McKenna*, 188 Conn. 671, 453 A.2d 435 (1982); *Patterson v. State*, 248 Ga. 875, 287 S.E.2d 7 (1982); *State v. Hanson*, 483 A.2d 723 (Me. 1984); *Neal v. State*, 272 Md. 323, 322 A.2d 887 (1974); *Griffin v. State*, 545 So.2d 729, 732 (Miss. 1989); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990); *State v. Janvrin*, 121 N.H. 370, 430 A.2d 152 (1981); *State v. Maestas*, 93 N.M. 765, 605 P.2d 1164 (1980).

locutory appeals but provide, as a matter of state law, for review by mandamus or certiorari.[17]

These variations in state procedure provide no reason to grant certiorari, and the fact that not all States read *Abney* identically does not present the sort of sharply defined conflict that requires resolution. Moreover, even if this issue warranted consideration at some point, this case hardly provides the occasion. Because defendant never raised a federal double jeopardy claim at trial, the question his petition presents is purely hypothetical. Beyond that, defendant has no colorable double jeopardy claim after the state trial court found that the prosecutor lacked the requisite intent.

CONCLUSION

For the reasons stated above, defendant's petition for certiorari should be denied.

Respectfully submitted,

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[17] *See People ex rel. Mosley v. Carey*, 387 N.E.2d, at 324 (Ill.); *State v. Robideaux*, 475 N.W.2d, at 916 (N.D.); *State v. Jenich*, 292 N.W.2d, at 349 (Wisc.); *State v. Sundel*, 460 A.2d 939 (R.I. 1983); *Whitwell v. State*, 529 S.W.2d 338 (Tenn. 1975); *Stamper v. State*, 672 P.2d 106 (Wyo. 1983).